IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-616

HOLLYWOOD, INC., a Florida corporation,
Petitioner,

vs.

CITY OF HOLLYWOOD, a municipal corporation of Florida,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a writ of certiorari issue to review the order of the Supreme Court of Florida in the above case dated May 17, 1977, deemed rendered July 29, 1977 by order of that date denying petition for rehearing.

OPINIONS BELOW

The orders and opinions of the Supreme Court of Florida, the Fourth District Court of Appeal of Florida, and the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, which

give rise to this petition appear in the appendix hereto and are listed in chronological sequence hereafter as follows:

1. The opinion and decision of the Supreme Court of Florida in *Hollywood, Inc.* v. *City of Hollywood,* rendered November 18, 1975 and reported in 321 So. 2d 65 (Fla.1975).

2. Order of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, dated June 23, 1976 denying petitioner's motion for leave to file amended and supplemental answer.

3. Decision of the District Court of Appeal of Florida, Fourth District, dated October 29, 1976, affirming per curiam the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida.

4. Order of the Florida Supreme Court dated May 17, 1977 denying petitioner's petition for writ of certiorari.

5. Order of the Florida Supreme Court dated July 29, 1977 denying petitioner's petition for rehearing to that Court.

JURISDICTION

The order of the Florida Supreme Court as to which review is sought was entered May 17, 1977. Petition for rehearing thereto was denied by order of the Florida Supreme Court dated July 29, 1977. This petition for a writ of certiorari is filed within 90 days of July 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The questions presented are:

Issue I

Whether the due process rights of petitioner were denied by the courts of Florida in not permitting petitioner to further plead by amendment or supplement after a decision which for the first time granted trial by jury.

Issue II

Whether the provisions of § 40.07(4), Florida Statutes, deny petitioner due process of law by permitting residents with an interest in the outcome of a case to be jurors at the trial of the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Chapter 40, Florida Statutes, is entitled "Jurors and Jury Lists". The provision thereof involved in this cause is § 40.07(4), Florida Statutes. It states:

> 40.07 *Persons disqualified.*—
>
> * * *
>
> (4) By Interest in the Subject Matter of the Cause.—No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state, or such county or municipal corporation.

Petitioner contends that as applied in this cause the last clause of said statute denies petitioner due process

of law under the Fifth and Fourteenth Amendments of the Constitution of the United States which provide as follows:

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV

SECTION 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

In August 1964 the tax assessor of Broward County, Florida, instituted an action for declaratory decree against petitioner and the City of Hollywood after the latter had filed its notice of claim to ownership to approximately two miles of beach land bordering the Atlantic Ocean in Broward County, Florida. In September 1964 the City of Hollywood filed its crossclaim against petitioner. Other parties subsequently joined the suit, but eventually were severed therefrom. The issue of ownership to the land which thus went to trial before the court in late 1970 was primarily between the City of Hollywood and petitioner. The trial court denied the City's demand for jury trial, asserted for the first time in February 1970, and entered its final decree in favor of Hollywood, Inc. on December 24, 1970.

The City's appeal to the District Court of Appeal of Florida, Fourth District, resulted in reversal of the lower court on the basis that evidence proffered by the City had been erroneously excluded by the trial judge.

That Court affirmed the denial of jury trial. See *City of Hollywood* v. *Zinkil,* 283 So.2d 581 (Fla.4th DCA 1973).

Both sides being less than perfectly happy, cross petitions for writ of certiorari were filed with the Florida Supreme Court which, after consideration, agreed that the rejected evidence should have been admitted and considered below, but also held that the City was entitled to jury trial on the issues of dedication and actual possession of the property. See *Hollywood, Inc.* v. *City of Hollywood,* 321 So.2d 65, 71 (Fla. 1975), appended hereto.

As a consequence of the foregoing decision, the parties for the first time were faced with the prospect of a jury trial, at least on some of the issues. Five years had passed since the first trial which was held without a jury.

Hollywood, Inc. proceeded to attempt to file amended and supplemental pleadings. As a first step, on December 18, 1975 it filed with the Florida Supreme Court an "Application . . . for Consent . . . to Replead and for other Relief." The same was returned by the Supreme Court Clerk upon the order of the Chief Justice solely as being in violation of Rule 3.14 e., Florida Appellate Rules. The Supreme Court, thus, did not rule.

Next, petitioner filed with the Circuit Court its motion for leave to file an amended and supplemental answer incorporating, *inter alia,* the defensive allegation that § 40.07(4), Florida Statutes, deprives petitioner of due process, along with seven other stated defenses, both legal and factual in nature.

By order dated June 23, 1976, appended hereto, the Circuit Court denied petitioner's motion to amend and supplement its answer despite the provisions contained in Rule 1.190, Florida Rules of Civil Procedure.

On appeal, Florida's Fourth District Court affirmed the lower court without opinion. See decision appended hereto dated October 29, 1976.

Thereafter, on May 17, 1977 (order appended hereto) the Supreme Court of Florida ruled it was without jurisdiction and denied the petition of Hollywood, Inc. for a writ of certiorari. Petition for rehearing was denied on July 29, 1977. See appended order of the same date.

REASONS FOR GRANTING THE WRIT

I.

It was and is fundamental error for the Florida Supreme Court to determine that "it is without jurisdiction" to entertain the petition of Hollywood, Inc. for a writ of certiorari, for that

(a) The first question involved was and is whether or not Hollywood, Inc., defendant in the trial court, had as a matter of constitutional or due process right, the right to file a supplemental answer after "reversal and remand" by the Florida Supreme Court, which supplemental pleading would assert defenses "setting forth transactions or occurrences or events which have happened since the date" of its last pleading in the trial court. The Florida Supreme Court by decision rendered 18 November 1975 in *Hollywood, Inc.* v. *City of Hollywood,* 321 So.2d 65 (Fla.1975), copy appended hereto, reversed the decision of the Fourth District

Court of Appeal of Florida in *Zinkil* v. *City of Hollywood,* 283 So.2d 581 (Fla.4th DCA 1973).

(b) The aforesaid decision of the Florida Supreme Court merely reversed and remanded the case without any specific instructions or directions other than that the City of Hollywood was entitled to a jury trial. Originally the case was brought on the equity side. It was a suit by the City of Hollywood to cancel of record, as clouds on the title to said lands, two money judgments entered in 1929, followed by execution sales thereon held in September and December, 1930. The conversion of the equity suit to an action at law to be tried by a jury, as was done by the Florida Supreme Court in its aforesaid decision, of necessity requires a recasting of the pleadings of both parties.

"Reversal and remand" left the case as though there had been no trial in November, 1970, and no Final Judgment on 24 December 1970.

It was not only within the jurisdiction of the Florida Court, but it was the duty of that Court, to give directions to the trial court to allow the parties to recast their pleadings and file additional pleadings. The order of the Florida Supreme Court entered on 17 May 1977 does violence to all of the aforesaid jurisprudential principles of Florida and the nation in that the constitutional right to file such supplemental answer is within the protection of the "Due Process of Law Clause" of both the Florida and Federal Constitutions. Such denial is tantamount to a denial of a right of a litigant to assert his defenses by a pleading.

The leading decision of the Florida courts on the procedure which follows a "reversal and remand" is spelled out with particularity in *Webb Furniture Co.,*

Inc. v. *Everett,* 105 Fla.292, 141 So.115, (1932) wherein the late Mr. Justice Terrell, speaking for the Florida Supreme Court, outlined the procedure to be followed in these words:

> The sound rule seems to be that, when error occurs in the trial of a common-law action by reason of which the judgment is reversed, on remand of the cause, the parties are restored to the position they found themselves, at the time the error was committed, and the cause must be tried again. . . .
>
> * * *
>
> It follows that plaintiff's motion to amend its declaration should have been granted and a new trial ordered.
>
> * * *
>
> The judgment below is reversed, with directions to that court to grant the plaintiff's motion for leave to amend its declaration and to award a new trial.

141 So. at 116

II.

The Florida Supreme Court ignored the Federal constitutional question which was introduced in the proposed supplemental defense. It must be remembered that not until the decision of that Court in *Hollywood, Inc.* v. *City of Hollywood,* 321 So.2d 65 (Fla.1975) was it determined that the City of Hollywood was entitled to a "jury trial" in this cause. A jury trial had been denied the City of Hollywood by the trial court and by the decision of the Fourth District Court of Appeal in *Zinkil* v. *City of Hollywood,* 283 So.2d 581 (Fla. 4th DCA 1973). Thus the first opportunity in the case thereafter arose whereby

Hollywood, Inc. could challenge on Federal constitutional grounds the validity of the following provision embraced in § 40.07(4), Florida Statutes:

> . . . but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state, or such county or municipal corporation.
>
> (The above sentence is also included as the last sentence of § 38.01, Florida Statutes, relating to judges.)

At least two decisions of the United States Supreme Court touch this question.

In *Tumey* v. *Ohio,* 237 U.S. 510 (1927) this Court found that state statutes which permitted a village mayor to adjudge alleged violations of prohibition laws in return for compensation for convictions worked a denial of due process upon the defendants in violation of the Fourteenth Amendment. Chief Justice Taft, speaking for this Court, said:

> . . . the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.

273 U.S. at 532

To like effect was the decision in *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972). Again a mayor sat in

judgment upon alleged ordinance violations. The mayor received no compensation directly for such service, but the town derived a large portion of its income from the fines, fees and costs imposed in the mayor's court.

While the instant case was pending in the Florida Supreme Court, this Court rendered a further decision on 10 January 1977 on the constitutional issues thus presented. See *Connally* v. *Georgia,* —— U.S. —— (50 L.Ed.2d 444) No. 76-461, reversing the Supreme Court of Georgia, 237 Ga.203, 227 S.E.2d 352. To the aforesaid decision there should be added another decision of the United States Supreme Court, *Coolidge* v. *New Hampshire,* 403 U.S. 443, reversing the Supreme Court of New Hampshire, 109 N.H. 403, 260 A.2d 547.

The decision of the Florida Supreme Court entered on 17 May 1977 denying Hollywood, Inc., the right to defend the cause by filing its supplemental answer constitutes a deprivation and denial of "Due Process of Law", as guaranteed to it in both the State and Federal Constitutions.

All courts have studiously attempted to avoid a definitive definition of the "Due Process of Law Clause", being satisfied to consider the same in the light of the facts submitted. Other than the classical definition given by Daniel Webster in the *Dartmouth College* case, the leading definition is that by Chief Justice Taft in the case of *Truax* v. *Corrigan,* 257 U.S. 312, wherein he said:

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily

> or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. . . .

257 U.S. at 332

The order of this Court of 17 May 1977 in fact denies to Hollywood, Inc., the right to defend the case by asserting defenses arising out of

> transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

RCP 1.190(d),
"Supplemental Pleadings"

The last pleading filed in the cause by Hollywood, Inc., in the Circuit Court was on 2 June 1970, addressed to the Amended Complaint of the City of Hollywood filed 22 May 1970. The denial by the Florida Supreme Court of the right of Hollywood, Inc., to present such a defense deprives it of its Federal Constitutional right of Due Process of Law.

While the foregoing decisions of this Court involved criminal proceedings in which the municipal "judges" or officers, or their community, had a not insubstantial pecuniary benefit or interest in the outcome of a case, still the principle enunciated seems clear: No person should be a judge in his own case. In the case at hand the issue is the ownership of a valuable and substantial piece of oceanfront beach. A verdict for petitioner means that the beach will be "private". A verdict for the City of Hollywood will render the beach "public". Is it realistic to believe that any resident of Hollywood, Florida, or of Broward County, Florida for that mat-

ter, objectively can avoid the "temptation . . . to forget the burden of proof required" or "hold the balance nice, clear and true" between these contestants over such an issue?

Thus does § 40.07(4), Florida Statutes, violate petitioner's due process rights; and the Florida courts have clear violated those rights by denying petitioner even the opportunity to plead or urge them.

As Mr. Justice Black said in the *Matters of Murchison and White,* 349 U.S. 133 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.
>
> 349 U.S. at 136

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF FLORIDA

HOLLYWOOD, INC., a Florida Corporation,
Petitioner-Cross Respondent,

v.

CITY OF HOLLYWOOD, a Municipal Corporation,
Respondent-Cross Petitioner.

No. 44662

April 23, 1975.

Rehearing Denied Nov. 18, 1975.

PER CURIAM.

This cause is before us on a petition and cross-petition for writ of certiorari to review the decision of the District Court of Appeal, Fourth District, reported at 283 So.2d 581. Our jurisdiction is based on conflict [1] between the decision sought to be reviewed and City of Sanford v. Ashton; [2] Cape Sable Corporation v. McClurg; [3] Canell v. Arcola Housing Corp.; [4] Burnham v. Davis Islands, Incorporated; [5] Wise v. Quina; [6] Owen v. Yount; [7] Katcher v. San Souci Company; [8] Grable v. Nunez; [9] Foremost Properties,

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[1] Article V, Section 3(b)(3), Florida Constitution.

[2] 131 Fla. 759, 179 So. 765 (Fla.1938).

[3] 74 So.2d 883 (Fla.1954).

[4] 65 So.2d 849 (Fla.1953).

[5] 87 So.2d 97 (Fla.1956).

[6] 174 So.2d 590 (Fla.App.1965).

[7] 198 So.2d 360 (Fla.App.1967), cert. den., Fla., 204 So.2d 330.

[8] 200 So.2d 826 (Fla.App.1967), cert. disch., Fla., 217 So.2d 297.

[9] 64 So.2d 154 (Fla.1953).

Inc. v. Gladman;[10] Downing v. Bird,[11] and City of Palmetto v. Katsch.[12] The petition for writ of certiorari reflected apparent jurisdiction of this Court. We issued the writ and have heard argument of the parties. Upon further consideration of the matter, we have determined that the cited decisions present no direct conflict as required by the constitution, except as to the denial of a jury trial.

The facts of this case are as follows:

In the early 1920's, one Joseph Young began the development of what later became the City of Hollywood (he called it Hollywood-By-The-Sea). Young planned a seaside resort to rival Atlantic City, then at its zenith, one which would appeal to all classes desiring the advantages of climate and oceanfront. The plan for the beachfront was that a thirty foot boardwalk would run the length of the city, paralleling the ocean and upland from it. Between the boardwalk and the water's edge, the beach would be graded and maintained as a permanent bathing beach.

On January 11, 1924, the plat of Hollywood Beach Second Addition was recorded by Young's Home Seekers Realty Company; on September 9, 1924, the plat of Hollywood Central Beach was recorded by the same company. On November 25, 1925, the Respondent, City of Hollywood, was created. In August, 1927, Young deeded to Respondent all of "the streets, drives, boulevards, alleys, ways, walks, avenues, parkways, and highways, by whatever name they may be termed, platted and described in that certain plat, also named in an amended plat, of Hollywood Central Beach". Although Block 205 was not labeled on the plat, the then current price list made it clear that 205 was a "parkway". Almost two years later, on April 25, 1929, two large money judgments were entered against Home Seekers

[10] 100 So.2d 669 (Fla.App.1958), cert. den., Fla., 102 So.2d 728.

[11] 100 So.2d 57 (Fla.1958).

[12] 86 Fla. 506, 98 So. 352 (Fla.1923).

Realty Company, leading to later execution sales and Sheriff's deeds. The Respondent's minutes of July 2, 1930, show that it had actual express notice of the proposed execution sale. On September 1, 1930, Highway Construction Company of Ohio, Inc., acquired title to Block C, Hollywood Beach Second Addition; later, on December 1, 1930, that same company acquired title to Block 205, Hollywood Central Beach. Thereafter, on February 18, 1931, Highway Construction Company conveyed title to Petitioner by fee simple deed, which Petitioner recorded February 21, 1931. In June, 1964, Respondent recorded its notice of claim of ownership. In August, 1964, the tax assessor for Broward County sued both Petitioner and Respondent for a declaratory decree and equitable relief, alleging that both parties claimed ownership of two miles of ocean-front beach and that the tax status of the land was unclear. In September, 1964, Respondent filed its cross-claim against Petitioner.

Petitioner claims that its title to the land in question was derived from a Sheriff's Deed issued to Highway Construction Company, which company subsequently conveyed its interest to Petitioner in 1931. Respondent predicates its claim of ownership upon various acts and occurrences, including documentary and testimonial evidence reflecting ownership by virtue of a deed from the original owner, as well as ownership arising by dedication and prescription. The trial court held, *inter alia,* that Respondent possessed neither title nor other interest or rights in the property, and that title is in the Petitioner.

The District Court of Appeal, Fourth District, reversed and remanded for a new trial, finding that the trial court erred in rejecting certain documentary and testimonial evidence bearing on the Respondent's claims of ownership by dedication. In reversing, the District Court adopted the seven methods for indicating an intent to dedicate land to public purpose as set forth in City of Palmetto v. Katsch.[13]

[13] *Id.*

The District Court found that the rejected evidence related to each of the categories established as a test in *Katsch, supra,* and that it had a direct bearing on the issue of acceptance of dedication. The District Court advised the trial court, on remand, to consider the applicability of City of Daytona Beach v. Tona-Rama, Inc.[14] to the issue of prescription, however, subsequently that decision was quashed by this Court.[15] The District Court held also that prior decisions by it on an earlier interlocutory appeal and by this Court on petition for certiorari were neither conclusive nor dispositive of the Respondent's claim of ownership of the land.[16] Additionally, the District Court rejected Respondent's claim for a jury trial.

The Respondent defended its ownership of the beach in question under several legally independent theories, including deed, dedication, prescription and adverse possession. To support its theory of common law dedication, Respondent proffered, *inter alia:* many of Young's publications (including pamphlets, magazines, brochures and advertisements) clearly stating that it was his intent that the beach be dedicated to the City; oral testimony of Young's officials and salesmen which corroborates the documentary evidence; oral testimony of Young's purchasers which corroborates the documentary evidence; the plats themselves; deeds to lots west of the boardwalk indicating conveyance as waterfront property; Young's price list describing Block 205 as a "parkway"; the Respondent's newspaper advertisements prior to 1930 proclaiming ownership of the beach; the fact that the present beach has always been open to public use and no permission was needed to use the beach; Respondent's tax rolls beginning in 1926, showing

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[14] 271 So.2d 765 (Fla.App.1973).

[15] City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974).

[16] 232 So.2d 769 (Fla.App.1970), cert. den., Fla., 238 So.2d 111.

that it has always treated the beach property as public land belonging to it; Respondent's publications which have proclaimed its municipal ownership of the beach continuously since 1926; evidence of the fact that in 1938 Respondent granted an easement to the United States for deposit of spoil on the beach; and evidence of Respondent's continuous maintenance, upkeep and improvement of the beach since 1925. This voluminous mass of data was not admitted by the trial court, an act which was held to be error by the District Court; we agree. Relying on *Katsch, supra,* the District Court held:

> ". . . a 'common-law dedication' is the setting apart of land for public use, and to constitute it there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the land to the public use, and an acceptance by the public of the dedication. This seems to be the general rule, and whether an express or an implied dedication is relied on, *the intention of the owner to set apart the lands for the use of the public is the foundation and essence of every dedication* . . . .
>
> "The act of dedication is affirmative in character, need not be by formal act or dedication, may be by parol, may result from the conduct of the owner of the lands dedicated, *and may be manifested by a written grant, affirmative acts, or permissive conduct of the dedicator.* In fact, any manner in which the owner sees fit to indicate a present intention to appropriate his lands to public use meets the requirement of the law.
>
> "The means generally exercised to express one's purpose or intention to dedicate his lands to the public use are by a (1) written instrument executed for that purpose; (2) filing a plat or map of one's property designating thereon streets, alleys, parks, etc.; (3) platting one's lands and selling lots and blocks pursuant to said plat indicating thereon places for parks,

streets, public grounds, etc.; (4) recitals in a deed by which the rights of the public are recognized; (5) oral declarations followed by acts consistent therewith; (6) affirmative acts of the owner with reference to his property, such as throwing it open in a town, fencing and designating streets thereon; (7) acquiescence of the owner in the use of his property by the public for public purposes.

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"The evidence which was rejected related to each of the categories enumerated in City of Palmetto v. Katsch, supra. The evidence, additionally, had a direct bearing on the question of *acceptance* of dedication. The acceptance of a dedication may be by formal action of the proper authorities or it may be by public user. Robinson v. Town of Riviera, 1946, 157 Fla. 194, 25 So.2d 277 . . . .

• • • • • •

"To reiterate, the excluded evidence directly related to the issue of the dedicator's intention to dedicate and the mode and manner of the acceptance of such dedication as to both Block 205 and Block C. The City, therefore, should be afforded the opportunity of presenting evidence on the issue of common law dedication and the trial court should give due consideration thereto. Cf. Boothby v. Gulf Properties of Alabama, Fla.1948, 40 So.2d 117.

"In considering the evidence bearing upon the issue of common law dedication consideration must also be given to the legal effect of the 1927 deed executed by appellee's predecessor in title in favor of the City as such deed may relate to Block 205. The City sought to introduce the deed *and* other extrinsic evidence to establish that the conveyance of "walks" and "parkways" referred to in the deed was intended by the owner thereof to be a conveyance of Block 205. Whether the City would have been successful in *proving* what

the grantor's intention was with respect to the use of the word "parkway" does not determine the question of *admissibility* of the deed and consideration of extrinsic evidence . . . ."

Turning our attention to that portion of the District Court's opinion which refers the trial court to the decision of the District Court of Appeal, First District, in City of Daytona Beach v. Tona-Rama, Inc.,[17] we note that this Court in reversing that opinion said:[18]

"It is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land . . . .

• • • • • •

"This Court in Downing v. Bird, 100 So.2d 57 (Fla. 1958), set forth the test for right of access by prescription:

'In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition *the use must be adverse under claim of right* and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights *the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use,* for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.'

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[17] *See* Note 14, *supra.*

[18] *See* Note 15, *supra,* at pp. 75-78, incl.

"The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land —but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected . . . .

* * * * * *

"If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area."

Contrary to the facts in that case, we find that the evidence of prescription sub judice satisfies the test of adverse user set forth therein; for example: for over half a century, Respondent uninterruptedly published to the world that the beach belonged to Respondent; although Respondent never asked permission to use the beaches, yet it has openly and adversely occupied the beach by improving it, erecting showers, planting trees, posting city signs, providing life guards and routinely raking, grading and maintaining the beaches; the public has used the beaches daily; Respondent has carried the property on its tax rolls as public beach, although the county did not always do so; although Petitioner twice wrote Respondent (once in 1945 and again in 1948) advising it that the company owned the land and that it wished the lands placed in the company's name on the tax rolls, Respondent refused to do so; and Respondent spent well over a million dollars on the beaches in its maintenance and improvement of them over a 50-year period. We conclude that on remand the trial court would be well advised to consider the facts developed sub judice in light of this Court's opinion in the *Tona-Rama* case, *supra.*

We have considered the remaining issues raised by Petitioner and find them to be without merit.

Respondent by its cross-petition seeks reversal of the trial court's order, affirmed by the Fourth District Court of Appeal, denying it a trial by jury. The District Court simply rejected the Respondent's claim for a jury trial, saying that "the City has failed to demonstrate that it is a '*defendant* . . . in actual possession' so as to give rise to a trial by jury," citing Fla.Stat. § 65.061 and Albury v. Drummond, 95 Fla. 265, 116 So. 236 (1928).

The facts are that in August, 1964, the tax assessor for Broward County sued both Petitioner and Respondent for a declaratory decree and equitable relief. Although no demand for jury trial was made in its original answer, filed September 3, 1964, the Respondent on February 3, 1970, filed a written motion for a jury trial on the issue of the dedication of the subject property to the municipality prior to 1930, and on the issue of the actual possession of the property. The essential grounds of the motion were that the issues of dedication and possession were factual issues which should be determined by a jury and that no prejudice could be shown to either party by granting a trial by jury. The trial judge, by order dated March 23, 1970, summarily denied the motion for a jury trial. Then, on May 22, 1970, the Respondent filed an amended answer and amended cross-claim against Petitioner, and on June 4, 1970, filed a demand for a jury trial on the issues of dedication and right to possession of the property, based on Fla.Stat. 65.061. Apparently the Respondent also filed another mo-

tion for jury trial on August 17, 1970, but in any event all demands and motions for jury trial made by the Respondent were denied by the trial judge.

In its amended answer the Respondent alleged, *inter alia,* that the subject property had been dedicated to the public and that the Respondent had actually possessed and used the property for the benefit of the public for more than twenty years. By cross-claim against Petitioner, Respondent sought to quiet title and to remove the cloud on Respondent's title caused by Petitioner's recorded deed from Highway Construction Company.

Petitioner counter-claimed against the Respondent seeking to remove the cloud from its title by cancellation of Respondent's previously recorded Notice of Claim to Real Estate and also counter-claimed for damages against Respondent for filing the allegedly false Notice of Claim to Real Estate. As noted above, the Respondent was denied requests for a jury trial before and after the filing of the amended answer and counter-claims.

Respondent's claim to a right to a trial by jury is based on Fla.Stat. 65.061, which reads in pertinent part as follows:

> "65.061. Quieting Title; additional remedy (1) Jurisdiction.—Chancery courts . . . shall determine the title of plaintiff and may enter a judgment quieting the title and awarding possession to the party entitled thereto, *but if any defendant is in actual possession of any part of the land, a trial by jury may be demanded by any party* whereupon the court shall order an issue in ejectment as to such lands to be made and tried by a jury. Provision for trial by jury does not affect the action on any lands that are not claimed to be in the actual possession of the defendant. The court may enter final judgment without awaiting the determination of the ejectment action." (Emphasis supplied)

Respondent's position is that not only was it a defendant in the original suit filed by the tax assessor, but that it was also a counter-defendant against whom affirmative relief and damages were sought by counter-claimant, Petitioner, and granted by the trial judge. It is also contended that the evidence is irrefutable that Respondent was in actual possession of the beach for half a century, exercising exclusive domain and control thereover, thus meeting both tests of F.S. 65.061. In its brief, the Petitioner raises several arguments in support of its contention that the Respondent is not entitled to a jury trial. It is argued, for example, that the Respondent was not a defendant, but a plaintiff, in a quiet title action; that the suit sought declaratory and equitable relief, which raised issues for the court and not a jury; that in the actual trial the Respondent assumed the position of plaintiff upon whom the burden of proof rested; that the respondent's contention that affirmative relief was awarded based on Petitioner's counter-claim against the Respondent is unsupported by the record; and that the record completely negates the assertion that the Respondent was in actual possession of the locus in quo. Finally, Petitioner contends that since neither it nor Respondent made any demand for jury trial within a ten-day period following the last pleading, provided by Florida Rules of Civil Procedure 1.430, the Respondent waived the right to a jury trial.

We hold that the Respondent was entitled to a jury trial on the issues of dedication and actual possession of the property and that the right to that jury trial has not been waived. Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U. S. and Florida Constitutions. See U. S. Constitution, Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, § 22.

There is substantial evidence in the record to support the Respondent's contention that it was in actual possession

of the property, that it openly improved the beaches for nearly half a century by constructing groins, rehabilitating the beach after devastating hurricanes, planting trees, erecting showers, posting city signs, providing life guards, and routinely and continuously raking, cleaning, grading nad maintaining the beaches. For the fifteen fiscal years ending in 1969, the Respondent's expenditures totalled $1,189,631.43 for the improvement and maintenance of the public beaches. Finally, it is undisputed that the public has daily used the beaches.

In the City of St. Petersburg v. Meloche, 92 Fla. 770, 110 So. 341 (1926), the issue before this Court was what constituted possession under the adverse possession statutes. We held:

> "As to the title of the complainant by adverse possession, it is true that, his claim not being founded upon a written instrument, or color of title, paragraph 2 of section 2936 of Revised General Statutes of Florida the occupation or possession required, viz.:
>
> > '1. Where it [the land] has been protected by substantial inclosure; or, 2—where it has been usually cultivated or improved.'
>
> "In considering the meaning of the word 'improved' as used in the statute, each case depends upon the circumstances of that particular case. In the one under consideration it could hardly be expected that the land should be cultivated as a farm, or even to have been inclosed by substantial fence. Reclaiming it from submerged land, having a house extending upon a portion of it, planting some trees upon it, placing the black dirt upon it, keeping a wood pile thereon, and the general notice to the public, might appear sufficient. In the case of Bensdorff v. Uihlein, 132 Tenn. 193, 177 S.W. 481, 2 A.L.R. 1364, we find very similar circumstances. Under a statute practically the same as ours as to the necessary occupancy or possession, it was held that a triangular piece of land was so adversely held by the claimants, though the only evidence was that they had paved the same, it lying contiguous to their store buildig, and had used it as an entrance to their store; the general public being also permitted to constantly use the same." At 342.

It is difficult to comprehend how the Respondent could do more to possess the beach property, short of erecting buildings and enclosures, than by caring for it, maintaining it and allowing unquestioned use of the beach property by the public.

In Albury v. Drummond, *supra,* this Court held that in a suit to quiet title the Court must first find that the land or some particular part thereof is in the actual possession of one or more of the defendants before a jury trial may be had by any party. The question thus becomes whether either party to this dispute was a defendant in possession of the land.

Section 45.011, F.S.A., defines "plaintiff" as "any party seeking affirmative relief whether plaintiff, counter-claimant, crossclaimant, or third party plaintiff, counterclaimant or crossclaimant." "Defendant" is defined as "any party against whom such relief is sought" Applying these definitions to the case sub judice, we find that the Respondent easily fits within the definition of the term "defendant". Not only was the Respondent an original defendant in the suit brought by the tax assessor for Broward County against both Petitioner and Respondent, more importantly affirmative relief was sought and in fact obtained by Petitioner in its counterclaim against Respondent. The trial court below specifically granted the relief sought by Petitioner in the first of its two counter-claims by ordering that the Notice of Claim to Real Estate filed by Respondent on June 22, 1964, and recorded in the Broward County records,

be cancelled of record. There is no question that the Respondent, in defending against the counter-claim, the nature of which was an action to remove a cloud on Petitioner's title, was a defendant in actual possession of the property.

We find no merit in Petitioner's remaining contentions regarding, *inter alia,* Respondent's waiver of its right to a jury trial, and that a jury trial is not allowable in a suit in equity. Adams v. Citizens Bank of Brevard, 248 So.2d 682 (Fla. 4th DCA 1971). With respect to the question of waiver, we notice that although no timely demand for a jury trial was made by either party within ten days of the initial last pleadings directed to the issues desired to be tried, amended pleadings were filed by Respondent in May, 1970, and by Petitioner in June, 1970. In his Final Judgment the trial judge noted that the amended pleadings of Respondent first raised the issue of ownership by prescription, and the pleadings support this conclusion. *Where an amended pleading injects a new issue in the case* the time for filing a demand for a jury trial is revived although the party making the demand may have waived the right to a jury trial at the time of the initial responsive pleadings. See Leopold v. Richard Bertram and Co., 276 So.2d 225 (Fla. 3d DCA 1973) and Moretto v. Sussman, 274 So.2d 259 (Fla. 4th DCA 1973). It is not contended that Respondent failed to make a demand for jury trial to its amended answer and cross-claim.

The determination of whether a trial judge abused his discretion in denying a demand for jury trial must be decided on a case by case basis; however, due to the extreme time lapse between the filings of the pleadings in this case, the fact that amended pleadings were filed raising new issues, and the apparent lack of prejudice resulting to the Petitioner in granting Respondent a jury trial, we hold that the trial judge abused his discretion in denying Respondent's demand for jury trial.

In conclusion, conflict having been demonstrated, as to the denial of a jury trial, that portion of the District Court's opinion denying Respondent a jury trial is quashed with directions to remand for proceedings consistent herewith.

ADKINS, C. J., ROBERTS, BOYD and MCCAIN, J.J., and FERRIS, Circuit Judge, *concur.*

OVERTON, J., *concurs in judgment only.*

DEKLE, J., *dissents.*

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR BROWARD COUNTY

No. 64-3721

Alto Adams, Judge Pro Hac Vice

WILLIAM G. ZINKIL, SR., as Tax Assessor of Broward County Florida, *Plaintiff*,

vs.

CITY OF HOLLYWOOD, a municipal corporation of Florida, and HOLLYWOOD, INC., a Florida corporation, *Defendants*.

Order Denying Motion for Leave to File Amended and Supplemental Answer

THIS CAUSE came on to be heard before me upon the Motion of Defendant, HOLLYWOOD, INC., for Leave to File Amended and Supplemental Answer, including the substitute pages 7, 7-A, 8 and 20 filed pursuant to Notice dated June 7, 1976, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED that said Motion be and the same is hereby denied.

DONE and ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida this 23rd day of June, 1976.

/s/ ALTO ADAMS
Circuit Court Judge

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1976

CASE No. 76-1478

HOLLYWOOD, INC., a Florida corporation, *Appellant*,

v.

WILLIAM G. ZINKIL, SR., as Tax Assessor of Broward County, Florida, and CITY OF HOLLYWOOD, a municipal corporation of Florida, *Appellees*.

Decision filed October 29, 1976.

Interlocutory appeal from the Circuit Court for Broward County; Alto Adams, Judge.

Sherwood Spencer of Ellis, Spencer, Butler and Kisslan, Hollywood, and Carl A. Hiaasen of McCune, Hiassen, Crum, Ferris & Gardner, Fort Lauderdale, for appellant.

Ray H. Pearson, Larry S. Stewart and Bertha Claire Lee of Frates Floyd Pearson Stewart Richman and Greer, Miami, and J. Bart Budetti, City Attorney, for Appellee-City of Hollywood.

PER CURIAM.

Affirmed.

MAGER, C.J., CROSS and ALDERMAN, JJ., *concur*.

SUPREME COURT OF FLORIDA

TUESDAY, MAY 17, 1977

CASE No. 50,545

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

76-1478

HOLLYWOOD, INC., etc., *Petitioner,*

vs.

CITY OF HOLLYWOOD, etc., *Respondent.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, Acting C.J., BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., *concur.*

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 29, 1977

CASE No. 50,545

District Court of Appeal, Fourth District

76-1478

HOLLYWOOD, INC., etc., *Petitioner,*

vs.

CITY OF HOLLYWOOD, etc., *Respondent.*

On consideration of the petition for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-616

HOLLYWOOD, INC., a Florida corporation,
Petitioner,

vs.

CITY OF HOLLYWOOD, a municipal corporation of Florida,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

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IN THE

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Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

Agreeable to Rule 24, Petitioner submits this Supplemental Brief.

I.

All the parties are in accord as a consequence of the decision of the Supreme Court of Florida in

Hollywood, Inc. vs. City of Hollywood,
321 So. 2. 65,
Decided April 23, 1975,
Rehearing Den. November 18, 1975,
Reversing

Fourth District Court of Appeal of Florida
Reported 283 So.2d 581,
Decided 25 September 1973
Rehearing Den. October 23, 1973,

which left the case without any trial—without any evidence before the Court, and without any Judgment. In short, it left the case in the pleading stage. Within season and in appropriate manner, Hollywood, Inc., sought to file a supplemental answer. This was in conformity with Rule 1.190(d), which is in substance the same as Federal Rule 15(d). It permits a litigant to file

> "* * * a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

The expression,

> "* * * transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented,"

is identical with the language used in Federal Rule 15(d).

To the application of Hollywood, Inc., to file such supplemental pleading, the Respondent, City of Hollywood, filed no written response, reply or objection. The Florida Courts refused to allow Hollywood, Inc., to file such supplemental pleading. The record therefore does not disclose the reasons activating the Court in denying the application to file the supplemental pleading. Such judicial action is in and of itself standing all alone a denial of Due Process of Law to Hollywood, Inc.

Donald Lindsey vs. Dorothea M. Normet, 405 US 56, 31 L.Ed. 2d 36, at page 46, 92 Sup.Ct. 1972.

> "'*Due process requires that there be an opportunity to present every available defense.*' (Citing numerous decisions)"

II.

The first Supplemental Defense which was sought to be asserted (but leave denied) involved the constitutional challenge of the last sentence of Section 40.07 (4), Florida Statutes. We again quote Subparagraph (4) and emphasize the last sentence:

> "40.07 Persons disqualified.—
>
> "(4) BY INTEREST IN THE SUBJECT MATTER OF THE CAUSE.—No person interested in any issue to be tried therein shall be a juror in any cause; *but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state, or such county or municipal corporation.*"

In our original Petition we cited, in support of our challenge of the validity of the statute, the case of

Tumey vs. Ohio,
273 U. S. 510, 47 S.Ct. 437,
71 L.Ed. 742, 50 A.L.R. 1243,
Reversing 115 Ohio St. 701, 155 N.E. 698

That case was decided 50 years ago. Chief Justice Taft, writing for a unanimous Court, came to grips with the precise statute now challenged. He said:

> "*The strict common-law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits*

against the municipal corporation of which they have been residents. (Citing many cases)" (Emphasis supplied)

71 L.Ed. at 757, 50 A.L.R. at 1252

The latest decision of this Court on this question was rendered in January of this year.

Connally vs. State of Georgia,
—— US ——, 50 L.Ed.2d 444,
97 S. Ct. 546, 45 L.W. 3461,
Decided January 10, 1977,
Reversing the Supreme Court of Georgia,
237 Ga. 203, 227 S.E.2. 352.

III.

The City of Hollywood in its opposition brief contends that the above Statute does not come into operation, for that there are 29 cities within Broward County, Florida. This fact nowhere appears in the record and is completely unsupported by any documentary reference. Such contention by the City of Hollywood can mean only that it concedes that the challenged statute is unconstitutional.

Our principal answer to this contention is to be found in the nature of the complaint of the City of Hollywood and its chief prayer therein. It does not seek a judgment determining that the City is the owner of the locus in quo, but on the contrary this is a prayer of the City on which the case was tried:

"* * * City of Hollywood * * * prays that this Court take jurisdiction of the parties hereto and the subject matter hereof *and find* that Block C, Hollywood Beach, Second Addition, and Block 205, Hollywood Central Beach, *are public property,* and that said property is *exempt from taxation*; * * * ".

The instant litigation was begun on August 14, 1964, more than 13 years ago. Throughout this time and for more than 30 years prior thereto, the locus in quo had been taxed for both county and municipal purposes, the taxes paid by Hollywood, Inc., and its predecessors, and received by Broward County and the City of Hollywood and retained by them.

IV.

The Federal Rules of Civil Procedure went into effect on 16 September 1938. Rule 2 abolished the procedural distinction between Law and Equity. Its language was compressed into one short sentence—

"There shall be one form of action to be known as 'civil action'."

This Rule did not alter the substantive differences between Law and Equity. Florida did not follow suit. It was not until January 1, 1967 (29 years later) that Florida adopted Federal Rule 2, 187 So.2. 598, Rule 1.040,

"Rule 1.040. One Form of Action

"There shall be one form of action to be known as 'civil action'.
"Committee Note: Federal Rule 2."

187 So.2., at 600.

We have seen that the case was begun on August 14, 1964. It was therefore labeled and denominated *"In Chancery"*. When the City of Hollywood filed its complaint seeking the relief as herein described, it labeled its pleading *"In Chancery"*. It was not until after January 1, 1967, that the litigants dropped the label, "In Chancery". The relief sought by the City of Holly-

wood was such as formerly allowed by an Equity Court. The City had 3 prayers in its complaint:

(a) A final judgment determining and adjudicating that the subject property was and constituted "public property" and exempt from taxes.

(b) Cancellation of the sheriff's deeds issued in 1930 consequent upon execution based on final judgments rendered in April, 1929.

(c) An injunction against Hollywood, Inc., from asserting or claiming any title or possessory interest to the subject property.

It should be borne in mind that the City of Hollywood waited for 34 years after the execution sales and sheriff's deeds in 1930 before it began any action in August, 1964, to assert its right to the property.

The nature of the property involved in the case is succinctly stated in the first sentence of the decision of the District Court of Appeal, as follows:

> "(1) This appeal involves conflicting claims of ownership of two blocks of vacant, unimproved, oceanfront beach land (Block C and Block 205)."
>
> 283 So.2. 581, at page 582.

After the Supreme Court of Florida reversed the decision of the District Court of Appeal and determined that the City of Hollywood was entitled to a jury trial—there was no order requiring the parties to recast their pleadings so as to make a jury case out of it. Obviously, since the property was vacant, unimproved and no one in possession—ejectment would not lie. To be sure, jury trials have been permitted in equity cases, but then only in an advisory capacity. At this

juncture of the case it is impossible to determine what issues are to be tried before a jury. When Hollywood, Inc., sought to file its supplemental pleading, it sought to gear its defenses to the decision of the Supreme Court requiring a jury trial, but this was denied. All of this adds to the claim that Hollywood, Inc., was denied Due Process of Law.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-616

HOLLYWOOD, INC., a Florida Corporation,
Petitioner,

vs.

CITY OF HOLLYWOOD, a Municipal Corporation of Florida,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1977
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INTRODUCTION

This case has now been pending for over 13 years. Petitioner has seized upon every possible opportunity to delay final adjudication. As will be seen below this is another such attempt.

JURISDICTION

Petitioner claims jurisdiction because of an alleged denial of due process by having to submit to jury trial in Broward County, Florida. Respondent is one of 29 incorporated cities located within Broward County.

Respondent-City submits that there are no such jurisdictional bases for this petition. Trial has not yet commenced. Petitioner has not exercised its preemptory challenges and challenges for cause. There is nothing in the record to even remotely suggest that petitioner cannot receive a fair trial and due process by trial by jury in Broward County, Florida.

STATUTORY PROVISION INVOLVED

Chapter 40 of the Florida Statutes contains certain provisions relating to juror qualifications. Florida Statute 40.07 entitled "Persons Disqualified" provides in part:

> (4) BY INTEREST IN THE SUBJECT MATTER OF THE CAUSE.—No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state, or such county or municipal corporation.

Contrary to the allegations in petitioner's brief, this statute does not permit residents "with an interest in the outcome of a case to be jurors." It simply provides that the fact of mere residence, standing alone, does not constitute a grounds for challenge for cause. Obviously, if for *any reason* a juror indicates a bias, prejudice or interest in the outcome so as to be unable to fairly try the issues, the trial court should and presumably will follow the law and excuse that juror.

PROCEEDINGS BELOW

Respondent-City initially timely requested a jury under the Florida Rules of Civil Procedure on February 3, 1970 before filing its amended answer. That request, as well as additional pre-trial requests were all denied.

Those denials became one of the points involved in post-trial appeals. Ultimately the Supreme Court of Florida ruled that the Respondent-City was entitled to trial by jury. *Hollywood, Inc.* v. *City of Hollywood,* 321 So.2d 65 (1975).

Following that decision the Petitioner began a series of maneuvers designed to allow it to raise eight so-called "affirmative defenses." The first of those so-called "defenses" was that Florida Statute Section 40.07 was unconstitutional.

Petitioner first sought permission to amend from the Florida Supreme Court. Since the application was not authorized by any rule of court, it was rejected.

Petitioner then filed a motion to amend with the trial court. Since all of the true affirmative defenses had been already considered in the appellate courts* that motion was denied. Thereafter on October 29, 1976, the Fourth District Court of Appeal of Florida affirmed that order. *Hollywood, Inc.* v. *City of Hollywood,* 339 So.2d 1190 (Fla. 4th DCA 1976). And on May 17, 1977, the Florida Supreme Court denied a writ of certiorari, *Hollywood, Inc.* v. *City of Hollywood,* 348 So.2d 948 (Fla. 1977).

City of Hollywood v. *Zinkil,* 283 So.2d 581 (4th DCA 1973); *Hollywood, Inc.* v. *City of Hollywood,* 321 So.2d 65 (Fla. 1975).

QUESTIONS PRESENTED

Whether a statutory provision that city residents are not automatically disqualified from jury service denies due process in advance of any effort to select a jury.

REASONS FOR DENYING THE WRIT

Respondent-City is one of 29 cities within Broward County, Florida. This case is scheduled for trial in the Circuit Court in and for Broward County. Prospective jurors are drawn from throughout Broward County. There is nothing in the record to suggest that there will be any prospective jurors who are residents of the Respondent-City. Indeed, all prospective jurors may very well come from the other 28 cities or unincorporated areas of Broward County.

There is also nothing in the record to suggest that the trial judge will not follow the law and excuse any juror who has an interest in the case that will prevent that juror from being a fair and impartial juror.

This "contention" is not timely raised since it was never raised by petitioner in connection with any of the several applications of the Respondent-City for a jury trial. Indeed, it was not raised until after the Supreme Court of Florida ordered a jury trial in the Circuit Court in and for Broward County.

Note must also be taken of the fact that the proper remedy for an alleged prejudicial forum is a motion for change of venue. No such motion has been made in this case.

CONCLUSION

WHEREFORE, for the above reasons, the Respondent-City respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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